

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

DOCKET NO. 99-477

November 12, 1999

CMP NATURAL GAS, L.L.C.,
Petition for Approval to Furnish
Gas Service in the Municipalities
Of Westbrook and Gorham (§ 2105)

SUPPLEMENTAL
EXAMINER'S REPORT

NOTE: This Report contains the recommendations of the Hearing Examiner and Advisory Staff. Although it is written in the form of a Commission Order it does not represent the Commission's decision on any matter discussed herein. Oral Exceptions are scheduled for 1:00 p.m. and Deliberations for 2:30 p.m. on November 15, 1999.

I. SUMMARY

We hold this proceeding open until we resolve certain issues regarding affiliate dealings. We consolidate this case with Docket No. 99-739, our review of proposed affiliated interest transactions between CMP Natural Gas (CMP NG) and Central Maine Power Company (CMP) for transfer and use of CMP's electric corridors by CMP NG for its proposed pipeline to serve the Calpine Corporation facility in Westbrook.

Finally, we require CMP NG to show cause why it should not be subject to forfeiture or punishment for contempt for apparent misrepresentations to this Commission in the course of this proceeding.

II. PROCEDURAL HISTORY

A. Background

In this proceeding we consider CMP NG's petition for service authority to provide natural gas service in Westbrook and Gorham, and to the Calpine Corporation (Calpine) gas-fired electric generation facility located in Westbrook. CMP NG initially filed this case in mid-July 1999. Northern Utilities, Inc. (Northern) is already authorized to serve, and is serving, in both Westbrook and Gorham. Northern contests CMP NG's petition for authority to serve these municipalities and the Calpine facility. On September 9, 1999, the

Commission ordered that this matter be resolved, if possible, by or about November 1, 1999.

In an initial Examiner's Report issued November 2, 1999, the Advisory Staff concluded that there is a need for the services proposed by CMP NG in Westbrook and Gorham because there are unserved areas within each of those municipalities. In addition, the Advisory Staff concludes that CMP NG's proposed service to the Calpine facility is necessary because it is a type of service that Northern is not currently providing. The Advisory Staff also analyzed the impact on the incumbent utility (Northern) of authorizing a second utility to serve in these municipalities and found that it would not be harmed so long as CMP NG's authority was limited to new customers and locations that are not already served by Northern. Finally, under this condition, there would not be a wasteful duplication of expensive facilities if two distribution companies were authorized to serve.

Reason for Supplemental Report

Subsequent to the October 13, 1999 hearing in this proceeding, CMP NG provided additional information regarding CMP NG's dealings with its affiliate, CMP, whereupon the Hearing Examiner extended the procedural schedule for two weeks to allow further consideration of the late-released information as described below. The late-released information pertains to issues of the dealings between the CMP Group affiliates, CMP and CMP NG, for use of CMP's electric corridors for the Calpine project.

The Procedural History contained in the Examiner's Report issued November 2, 1999 outlines events in this proceeding up to that date. Subsequent events are outlined in Subsection B below.

The matters at issue in this Supplemental Examiner's Report involve questions of affiliate dealings and competitive fairness, as well as Northern's allegations of

unfairness due to CMP NG's abuse of the regulatory procedures. These issues bear on a determination of the public interest in allowing CMP NG to serve Calpine, Westbrook, and Gorham. If there were sufficient improper affiliate dealings, violations of law, or anti-competitive actions on CMP NG's part, we could conclude that it is not in the public interest to authorize CMP NG to serve or we could condition that authority in a manner that would protect the public interest. Finally, Northern has requested that the Commission impose sanctions on CMP NG's for actions that it sees as bad faith, violative of law, or otherwise frustrated the fair litigation of these issues before the Commission.

B. Supplemental Procedural History

On October 14, 1999, CMP NG provided the Commission and parties to this proceeding with copies of a series of executed agreements with its affiliate, CMP, for transfer of property rights and use of electric transmission corridors for the Calpine project.¹ Also on October 14, 1999, pursuant to the Hearing Examiner's ruling, CMP NG released certain information to Northern Utilities, Inc. (Northern) previously

¹On October 22, 1999, CMP NG and CMP made a joint filing seeking approval of these affiliated transactions pursuant to 35-A M.R.S.A. § 707. The Commission assigned this matter Docket No. 99-739 and issued a Notice of Proceeding on October 28, 1999 to the parties to this docket among others. Petitions to Intervene were due November 8, 1999 and an initial case conference is scheduled for November 17, 1999.

designated as confidential information. See *Order Denying Northern Utilities, Inc.'s Request to Release Confidential Information to Counsel Pursuant to 35-A M.R.S.A. § 1311-A (1)(D)*, (Oct. 12, 1999). See also Tr. G-207-245 (Commission hearing on Northern's oral appeal of Hearing Examiner's Oct. 12th ruling and modification of that ruling).

In addition, CMP NG provided additional new information to the Commission and the parties to this proceeding in the form of 1) data responses on newly-provided information, and 2) information released from confidential designation as a result of orders or other developments. See *Procedural Order - Briefing Issues and Change of Confidential Information Designations* (Oct. 14, 1999), *Procedural Order Extending Briefing and Case Schedule* (Oct. 20, 1999) (requiring CMP NG to respond to Northern's Fourth Data Request), *Procedural Order Requiring Confidential Designation and Re-redaction* (Oct. 20, 1999), *Procedural Order - Discovery Rulings & Telephone Conference* (Oct. 29, 1999), and *Procedural Order on Further Hearing Request and Northern Utilities' Appeal of Discovery Rulings* (Nov. 2, 1999).

The Hearing Examiner determined that further process to investigate this new information was warranted and extended the case schedule two weeks. See *Procedural Order Extending Briefing and Case Schedule* (Oct. 20, 1999). The extended schedule allowed for discovery and a hearing on the new information, if warranted.

On November 2, 1999, Northern requested a hearing on the late-filed information. Both OPA and MNE indicated that they would participate in a hearing if one were held, but did not request one. The Hearing Examiner denied Northern's request for hearing, but later granted Northern's appeal of this ruling. See *Procedural Order on*

Further Hearing Request and Northern Utilities' Appeal of Discovery Rulings (Nov. 2, 1999) and *Order Scheduling Hearing on Late-Released Information* (Nov. 4, 1999).

A further hearing was held November 5, 1999 to allow parties to cross-examine CMP NG's witnesses on late-released information. Northern, OPA, MNE, and Bangor Gas participated in the hearing.

On November 2, 1999, the Hearing Examiner issued an Examiner's Report in this proceeding, subject to further recommendation as necessary on issues developing out of the late-released information. Northern and CMP NG filed written exceptions to the Examiner's Report on November 8, 1999. OPA refers the Commission to its original Brief filed October 22, 1999.

Also, on November 2, 1999, Northern filed a Motion to Admit Late Exhibits to include three items that were cited in its initial brief: 1) CMP NG's response to NU-01-17 (Calpine is not an affiliate of CMP Group); Exhibit QK-1 from *Central Maine Power Company, Petition for Approval to Furnish Gas Service In and To Areas Not Currently Receiving Natural Gas*, Docket No. 96-786 (CMP NG Vice President, Darrel Quimby's curriculum vitae); and CMP-02-11 (Northern loses the ability to add capacity to its system in a cost-effective manner if CMP NG is authorized to serve). On November 8, 1999, CMP NG indicated that it did not object to the admission of these items into the record.

As allowed by Procedural Order dated October 29, 1999, Northern, MNE, OPA filed comments on CMP and CMP NG's request in related Docket No. 99-739 for expedited treatment of their joint '707 filing for use of CMP corridors to begin construction on the Calpine project. By Procedural Order dated November 4, 1999, issued in both dockets (99-477 and 99-739), the Hearing Examiner allowed CMP to file responsive comments on November 10, 1999. This request is scheduled for deliberation on November 15, 1999.

Northern, MNE, and CMP NG filed Supplemental Briefs on November 10, 1999. A Supplemental Examiner's Report issued on November 12, 1999.

III. CONTENTS OF THE RECORD

In addition to items described in the Nov. 2nd Examiner's Report, the record will also include Hearing Exhibits NU-2 and NU-3 and OPA-11. Further, Northern's Motion to Admit late Exhibits is granted to allow the responses to NU-01-17 and CMP-02-11 and Exhibit QK-1 from Docket No. 96-786 into the record. All responses to Advisor's data requests are also entered into the record.

IV. ISSUES & ANALYSIS

This Supplemental Examiner's Report addresses certain issues surrounding affiliated interest dealings between CMP and CMP NG, the release of confidential information by CMP NG, Northern's request for sanctions, and Northern's assertion that CMP NG made material misrepresentations of facts which violated Northern's due

process rights. This report replaces Sections F, G, and H of the original Examiners Report issued on November 2, 1999.

F. Affiliated Interest Dealings

Early in this proceeding Northern raised the issue whether there have been any inappropriate dealings between CMP NG and its affiliate, CMP, for use of CMP's electric transmission corridors. In its initial brief, Northern asserted that CMP NG was more confident than Northern about its ability to gain access to CMP's right of way and about the price it would need to pay to gain that access. Northern also suggested that Calpine may have decided to contract with CMP NG because Calpine believed, for whatever reason, that CMP NG would be in a better position to obtain CMP's agreement to use the right of way. In its supplemental brief, Northern argued that the Assessment Agreement between CMP and CMP NG supported its claim that CMP NG acquired the right of way unfairly.

MNE similarly argues that a gas LDC should not enjoy favorable terms or conditions or competitively advantageous access to an electric utility affiliate's rights of way and asserts that CMP NG was able to reach an agreement with CMP more quickly and easily than non-affiliates such as MNE or PNGTS. In addition, both Northern and MNE argue that because the contract between CMP and CMP NG was not signed until October 12, 1999, the parties were at a disadvantage in being able to fully pursue this issue.

Affiliated transactions such as allowing use of an existing CMP right-of-way (ROW or corridor) are very important to this Commission for several reasons. First, if the price for the ROW is too low, CMP's ratepayers may be subsidizing CMP NG customers through their electric rates. Second, if non-affiliates are excluded from access to and use

of existing electric utility corridors, development of a competitive market for gas (or other services which might wish to use the ROW) will be inhibited, which is clearly not in the public interest. Finally, as it becomes more difficult to site new transmission (whether for electricity, natural gas, or telecommunications) there is a public interest in insuring that the existing corridors are used wisely. In other words, we agree with MNE that affiliates should not have preferential access.

We here consider Northern's concerns on this matter.

1. Preferential treatment of CMP NG over Northern and Granite

In its Supplemental Brief, Northern requests that we deny CMP NG's request for authority to serve in Westbrook and Gorham "due to the absence of need given that the Calpine agreement was obtained unfairly." Alternatively, Northern requests that we condition CMP NG's authority to serve on approval of the affiliated agreements in Docket No. 99-739.

Northern maintains that CMP NG enjoyed a competitive advantage in gaining access to CMP's corridors which enabled it to successfully obtain a contract to serve Calpine. Similarly, Northern argues it was unfairly competitively disadvantaged by CMP NG and CMP's affiliated dealings around negotiations to serve

Calpine.² MNE does not allege that it encountered any particular competitive disadvantage in this instance but is participating in this proceeding in the interest of ensuring that there will be fair and open access to CMP corridors by non-affiliated entities.³

Northern's position that CMP NG received preferential treatment from CMP is based on the following: (a) it was denied access to the CMP right-of-way on the same basis as CMP NG when it inquired of CMP in March 1999 about gaining access, (b) CMP and CMP NG concealed their competitively advantageous Assessment Agreement from competitors by not filing for Commission approval under § 707 as required by law, thereby illicitly creating an unlevel playing field, and (c) Calpine's decision to contract with CMP NG demonstrates that Calpine must have been greatly influenced by affiliated dealings given the evidence Northern presented concerning the greater benefits which Northern (or Granite) could have provided to Calpine.

It is not possible to fully address these issues in the context of the current proceeding. CMP and CMP NG have separately filed for approval of the their right of way agreement in Docket No. 99-739. As a practical matter, the development of affiliated dealings issues in this case was limited by the fact that a central player, CMP, was not a party to this case and, therefore, did not participate in this. Nevertheless, we review the evidence presented here to determine whether there were

²In Northern's view, this competitive disadvantage extended also to its affiliate, Granite, another competitor to provide service to Calpine.

³Maritimes negotiated rights to use CMP's electric corridors to allow it to construct its interstate gas pipeline across portions of Maine during 1998.

any clear improprieties that were so egregious as to cause us to deny CMP NG's petition to serve Westbrook and Gorham at this time.

a. CMP's Treatment of CMP NG and Northern

In March of 1999, Mr. Cote, Northern's Vice President, contacted Mr. Grover of CMP to inquire about the right of way.⁴ Specifically, Mr. Cote testified,

The request was that I asked under what circumstances, if any, CMP allows for the use of right-of-way for parallel utility construction, and if the answer to that was, yes, it does, what were the technical parameters around that; what were the metrics to it, including, if he knew, you know, what the cost was, what the technical standards were, what the separation was from the pole line in terms of where you could locate the pipe, a whole variety of technical information is needed to do a viable estimate to use the right-of-way.

Tr. G-166. Mr. Cote went on to testify:

The response I got was, we need to -- you need to identify what right-of-way, approximately where you'd like to lie in the right-of-way, what offset from poles. There was a variety of specific technical information. It didn't -- and my understanding as a result of that call was that we do a whole series of kind of technical analysis, and then after review, CMP would determine whether or not Northern could use the right-of-way. Since we were on a very tight time frame, I believe I testified earlier in one of the technical sessions that that discussion occurred in late March. There simply wasn't that time for us to develop that information between then and even to make a response, and so there was no further discussion.

Tr. G-167-168.

In other words, Northern made one telephone inquiry to CMP requesting fairly detailed information concerning price, set back requirements and other technical information. Given the technical and detailed nature of the request, it would not seem unreasonable, on its face, for CMP to respond that it would like a written request, if only to avoid misunderstandings on such a detailed inquiry.

⁴ Mr. Grover serves on the Dig-Safe System Board of Directors with Mr. Cote. Tr. G-165.

On the other hand, there may have been a difference in how readily CMP agreed to meet with each entity to even discuss the possibility of access to the corridors. While Northern was asked to put a specific request in writing, CMP NG appears to have gained access to CMP personnel to discuss access prior to reducing the terms of its usage or project specifications to writing.⁵ Thus, there may have been a difference in CMP's reception to these entities in the initial stages of inquiry and negotiation. If present, such a difference could be attributable to the pre-existence of an agreement between CMP and CMP NG allowing CMP NG to access CMP ROWs to assess their use for pipelines (the Assessment Agreement), the close relationship of the CMP Group affiliates, or a even concerted effort to put off a non-affiliated competitor on this project. However, without further inquiry into the details of CMP's dealings with both entities, it is not possible to conclude that unfairness existed.

Beyond that, the record reveals little more than that CMP NG appears to have gained some degree of assurance of access or, perhaps, simply gambled on access, as a result of its early meetings with CMP personnel. Nevertheless, because Northern did not pursue the matter with CMP further than the initial telephone inquiry, the record does not allow us to conclude that it was unfairly denied access. In fact, Mr. Cote also testified:

Q. (MacLennan) Okay. Was there anything in your dealings with CMP over the use of the right-of-ways that led you to believe that there was competitive unfairness to Northern?

A. No.

Tr. D-97.

⁵Mr. Kenny testified that pipeline alignment sheets were exchanged between CMP and CMP NG but we do not know the dates or extent of the information that was exchanged or how it compares to what Northern was asked to provide. Tr. H- .

Abuse of affiliate relationships is not easy to demonstrate. On the basis of the record before us, proof of any unfair competitive dealings between the CMP Group affiliates is not apparent. Nevertheless the potential for affiliate abuse in this circumstance is strong enough, and the consequences so significant, that we are obligated to investigate thoroughly. We will do so in Docket No. 99-739 with a more complete array of players.

The Examiner's Report relied heavily on the fact that Northern did not further pursue access to CMP's corridors and did not actually submit a proposal to serve Calpine. Northern's attempt to acquire access to the electric utility corridors began and ended with one preliminary telephone inquiry. Yet, Northern argues that it had no realistic option at that point given the shortness of time available in which to prepare and submit a bid to Calpine and, without necessary information on use of CMP's right-of-ways, Northern (and Granite) could not present a competitive bid.

The Report concluded that because Northern's own actions resulted in, or substantially contributed to, it not serving Calpine, we could not find that Northern, rather than CMP NG, should serve Calpine. However, in its brief Northern argues that it is not seeking such a finding. Rather, it argues that CMP NG should not be given authority to serve Westbrook and Gorham (including Calpine) until and unless we approval the affiliate transactions for transfer and use of CMP's right-of-ways to CMP NG.

We agree. We cannot authorize CMP NG to serve its contracted customer (Calpine) or generally within the municipalities of Westbrook and Gorham until we are reasonably satisfied that it did not gain its contract with Calpine, and thus its reason to serve these municipalities, in a manner that was competitively unfair or illicit. We must thoroughly evaluate whether inappropriate dealings occurred and, if so, what regulatory

action is warranted.

b. The Assessment Agreement

The record shows that on or about October 1, 1998, CMP and CMP NG entered into an agreement that allowed CMP NG to gain access to certain CMP right-of-ways, but not including the one for service to Calpine, to determine whether they were suitable for CMP NG's purposes (the Assessment Agreement). In April of 1999, CMP and CMP NG amended this Agreement to include the Calpine project right-of-way.

Northern argues that the Assessment Agreement and any successive amendments required our approval under 35-A M.R.S.A. § 707. Northern argues that the Agreement is invalid without Commission approval, that CMP NG obtained a competitive advantage over competitors such as Northern through this Agreement, and that CMP NG should not be rewarded with a grant of authority to serve in Westbrook and Gorham by virtue of having obtained a contract with Calpine using this illicit advantage. See Northern Supplemental Brief at 2-3.

Northern further argues that if approval had been sought, Northern would have been aware of the Agreement and would have had grounds to request the same treatment afforded CMP NG under that Agreement.

Finally, Northern complains that the existence of this Agreement did not come to light until very late in this proceeding and then only when CMP NG was required to provide certain confidential information to Northern that refers to this Agreement on October 14, 1999. After several more discovery rulings, on October 29th, Northern obtained a redacted version of the Agreement. Northern argues that by not providing this information earlier in this case, CMP NG has perpetrated unfairness to the non-confidential parties in this litigation and should be sanctioned pursuant to Maine Rules of Civil Procedure, Rule 37(b)(2).⁶

1. Assessment Agreement Requires §707 Approval

Section 707(3) states that

[n]o public utility may ... make any contract or arrangement for the furnishing of ... any service ... with any affiliated interest until the Commission finds that the contract or arrangement is not adverse to the public interest and gives the contract or arrangement its written approval.

35-A M.R.S.A. § 707(3). The Assessment Agreement clearly falls within the statutory framework. However, subsections 707 (3) (C) and (F) allow the Commission to exempt certain contracts or arrangements by rule or by order under certain parameters.

CMP NG states that the Agreement is not subject to Commission review pursuant to the *de minimis* exemption of Ch. 820 of the Commission's rules.

⁶M.R.Civ.P. Rule 37, entitled "Failure to Make Discovery: Sanctions," section (b)(2) states that, if a party "fails to obey an order or to provide or permit discovery... the court in which the action is pending may make such orders in regard to the failure as are just", including dismissing the action or rendering a judgment of default against the disobedient party or treating the violation as contempt. The court may also award reasonable expenses. See also Ch. 110, section 825 of the Commission's Rules.

Chapter 820 establishes utility requirements for non-core activities and transactions between affiliates. A *de minimis* service is defined as one for which the utility investment and/or total gross revenue received for providing that service do not exceed 0.1% of the utility's annual gross revenues. Ch. 820 (2)(E). Services that exceed this *de minimis* threshold are subject to treatment as a non-core service under the rule which may require that the activity be carried out through a separate subsidiary of the utility. No exemption from § 707 approval is established in section (2)(E).

Nor do we find any apparent exemption in Ch. 820 that would eliminate the need for Commission approval of the Assessment Agreement. Rather, section 3(D) of the rule appears to state the contrary:

A utility must seek Commission approval for all transactions between the utility and its affiliate or affiliates pursuant to 35-A M.R.S.A. § 707 and section 4 of this rule.

Section 4 establishes the method for valuing utility goods, service and intangibles in transactions between affiliates, but does not offer a basis for exemption from the requirements of § 707.

The Assessment Agreement between CMP and CMP NG, executed October 1, 1998, and any subsequent amendments thereto, require Commission approval.⁷ We see no justification why either or both utilities did not file it with us for prior review and approval.

Northern argues that CMP and CMP NG may have decided

⁷Mr. Kelley testified that he understood that the electric utility does not collect revenues above this *de minimis* threshold amount for these services but deferred to his attorneys on whether approval of the Assessment Agreement is required. Tr. H- . Neither CMP NG's nor CMP's attorneys have explicitly addressed the question. They will have an opportunity to do so in the context of responding to our show cause order.

not to submit the agreement for approval to conceal its existence so that competitors would not become aware of it. The competitive circumstances among natural gas entities in Maine require that we fully investigate any matter that may constitute anti-competitive behavior through avoidance of required regulatory process or other abuse. We will pursue this matter further in this docket and Docket No. 99-739.

Consequently, we intend to issue an order requiring CMP NG to show cause why we should not subject it to sanctions, forfeiture or punishment for contempt for this omission pursuant to 35-A M.R.S.A. §§ 1502 and 1508.

Further, in resolving the pending service authority and affiliate transaction petitions, we will consider to what extent Northern's request that CMP NG be denied service authority in some or all of the areas in its current application may be an appropriate sanction.

c. Unreasonable Influence Over Calpine

Northern argues that, given the evidence it presented concerning the benefits which Northern could have provided to Calpine, Calpine's decision to contract with CMP NG demonstrates Calpine must have been greatly influenced by the affiliated dealings.

To accept this argument, we must first accept its premise, that service from Northern would be clearly more beneficial for Calpine but for the

alleged inappropriate affiliate dealings.⁸ There is no basis in the record which would allow us to conclude that service from either Northern or Granite would clearly be more beneficial than service from CMP NG from Calpine's perspective. In fact, Mr. DaFonte testified on behalf of Northern that there are a number of reasons why Calpine might have opted for service from CMP NG. Tr. D-78-79 **confidential**. The fact that Calpine did not chose Northern (or even solicit its bid) is not, in itself, proof that there was discrimination against Northern.

Yet, Mr. Cote also expressed his strong "puzzlement" that Calpine never issued an RFP or provide detailed specifications which would allow competitors to prepare offers from which Calpine could select the best priced one. Tr. D-97. Mr. DaFonte suggests that Calpine inexplicably appeared to pursue a course of limited options, choosing to work closely only with CMP NG rather than a broader range of competitors.

While we understand how the inference outlined by Northern could be drawn, we have no evidence at all regarding whether Calpine believed, or was led to believe, that CMP NG might have an easier time gaining access to CMP's corridor.⁹ The argument that CMP NG was able to reach its agreement because Calpine believed that CMP NG was favored over others is, therefore, speculative.¹⁰ Nevertheless, we cannot conclude on this record that it did not occur.

G. Late-Released Information

⁸Northern could offer these benefits by virtue of its affiliate, Granite. Tr. D-76.

⁹Calpine was not a party to this proceeding and was not called or subpoenaed by any party to be cross-examined; its letter of September 3, 1999 cannot be relied on as evidence. See *Evidentiary Ruling* (Oct. 12, 1999) at 3.

¹⁰Northern could have subpoenaed Calpine to determine whether CMP NG might have suggested it would have an inside track to obtaining the CMP right-of-way.

Northern complains that CMP NG has not released, or has seriously delayed its release of, information that is necessary for a full airing of the issues in this proceeding. Most of the information about which Northern complains relates to the dealings between CMP Group affiliates over the use of CMP transmission corridors. Attachment 1 to its Supplemental Brief lists multiple documents provided after the initial hearing in this proceeding, many of which were requested by Northern two months previous during the initial discovery phase of this proceeding. Much of this information was released only after protracted discovery disputes and rulings by the Hearing Examiner.

Both Northern and CMP NG have claimed the need for confidential treatment for certain information provided in this proceeding on the basis that it would reveal sensitive business information which, in the hands of a competitor, would result in harm to the entity. Both Northern and CMP NG have been accorded confidential treatment for such competitively sensitive information by protective orders.

There has been persistent controversy in this proceeding over just which information should be redacted or withheld from non-confidential parties and which should not. See *Procedural Order Granting Motion to Compel Discovery Responses* (Sept. 10, 1999); *Order Granting Northern Utilities, Inc.'s Request to Require CMP Natural Gas to Re-redact "Confidential" Filings* (Sept. 21, 1999); *Order Resolving Discovery Disputes* dated (Oct. 1, 1999); *Order Regarding Northern Utilities, Inc.'s Request to Release Confidential Information to Counsel Pursuant to 35-A M.R.S.A. section 1311-A(1)(D)* (Oct. 6, 1999); *Order Denying Northern's Request to Release Confidential Information to Counsel Pursuant to 35-A M.R.S.A. section 1311-A(1)(D)* (Oct. 12, 1999); *Procedural Order Extending Briefing and Case Schedule* (Oct. 20, 1999); *Procedural Order Requiring Confidential Designation and Re-redaction* (Oct. 20, 1999)¹¹; *Procedural Order - Discovery Rulings & Telephone Conference* (Oct. 29, 1999); and *Procedural Order on Further Hearing Request and Northern Utilities's Appeal of Discovery Rulings* (Nov. 2, 1999).

Clearly, a great deal of attention has been given by the Hearing Examiner to address these disputes and concerns. Indeed, this case created more need for mediation of disputes among parties than normally is the case and than is desirable. Still, it is unclear whether full information has now been provided, whether information was legitimately delayed or withheld, or whether Northern may have been prejudiced in its effective protection of its interests in the case.

¹¹Some of the information initially designated confidential was revealed by each party in open session technical conference or at hearing. The parties were required to release this information from confidential protection, consistent with the requirements of paragraph 6 of each protective order.

Northern argues that CMP NG's actions have been improper and have prejudiced Northern by impairing its ability to effectively litigate the issues in this proceeding. Whether CMP NG -- or any party -- has conducted itself improperly during the course of litigation before the Commission should be given careful attention to ensure that obstructive and unethical behavior is not allowed to occur in our proceedings.

Conducting a further review in Docket No. 99-739 on affiliate interest issues which are the subject of the late-released information and withholding any final decision on CMP NG's request for service authority, mitigates the risk that Northern may have been prejudiced in its litigation of these issues in this case. Further, Northern's request for sanctions on this point is satisfied by concluding that further review of these issues is warranted.

H. Request for Sanctions

On October 18, 1999, Northern requested that sanctions be imposed on CMP NG and CMP Group for their participation in presenting an inappropriate letter to the Commissioners from Arthur Adelberg in his capacity as Executive Vice President of CMP Group, a co-owner of CMP NG and parent corporation of CMP. The letter contained Mr. Adelberg's views on matters at issue in the proceeding, complained about Staff inquiry in the case, and repeated unsubstantiated hearsay allegations of misrepresentations by Northern to potential customers. The Hearing Examiner determined that the letter was inappropriate and sufficiently unreliable that it could not be considered credible evidence in this proceeding. See *Evidentiary Ruling* (Oct. 12, 1999) at 1-2. The Examiner denied Northern's request to sanction CMP NG by dismissing its petition for authority to serve Westbrook and Gorham but allowed Northern to develop a request for some other sanction identifying the source of Commission authority to do so.

Northern urges that the Commission impose the following three sanctions on CMP NG and CMP Group: 1) a two day schedule extension to compensate Northern for time spend reviewing the Adelberg letter, preparing cross-examination on it, and preparing responses to it dated October 8 and 12, 1999; 2) that Northern be permitted to write a letter directly to the Commissioners in this case "making factually based legal [arguments]"; and 3) that the Commission put CMP NG and CMP Group on notice that any similar actions will be viewed as a violation of a Commission order and be subject to imposition of fines pursuant to 35-A M.R.S.A. §§ 1503 and 1504.

Northern's request for a two-day schedule extension, given the highly compressed schedule in this case, is not unreasonable. However, we find it would not serve the desired purpose at this point in the proceeding.¹² Nor could we allow Northern's second request to be allowed to address the Commissioners directly with a similar letter. Such an action is improper in the first instance, or in any instance.

We do, however, grant Northern's final request. CMP NG and CMP Group are hereby notified that direct communications to the Commissioners on matters of substance during a pending case outside of any procedural context are inappropriate and may be subject to penalties provided in 35-A M.R.S.A. §§ 1503 and 1504. This is even if the communication is copied to all parties because it presents untested allegations to the decision-makers outside the procedural framework of the case, leaving parties without an opportunity to cross-examine the proponent or to provide a meaningful response. Moreover, it is unfair to the parties, as well as distracting to the Commission and its staff, to impose unnecessary, unreliable, and inappropriate communications on the proceeding.

I. Misrepresentations Regarding Time Frame for This Case

Northern complains that CMP NG blatantly misrepresented to the Commission the necessary timeframe for the completion of this proceeding. Northern points out that CMP NG maintained that its project construction was scheduled to begin November 1, 1999 and that Commission approval was necessary by or before that date. Then, on October 14, 1999, CMP NG filed its recently executed agreements for transfer of and use of CMP's corridors for the project. The Closing Agreement stipulates that the

¹²We note that Northern, in effect, already received this additional time given the extended briefing and case schedule already provided in this case.

transfer of the property rights from CMP to CMP NG will not occur until 30 days after the receipt of all government approvals. Consequently, CMP NG currently has no legal easement or right to use CMP's corridors for construction of a pipeline to serve Calpine, nor will it have such until the Commission grants either § 707 approval or grants an exemption therefrom.¹³ Northern argues, then, that CMP NG has throughout this proceeding misrepresented its time frame, causing the Commission to conduct an expedited proceeding and unjustifiably subjecting Northern and the other parties to a substantial burden, expense, and disadvantage in this litigation. Northern, MNE and OPA all suggest that CMP NG's effort to start construction this month by having Cianbro contract with CMP for use of its corridors pending § 707 review of CMP NG's proposal to use the CMP's corridors for this project is contrived.

It is difficult to believe that the contradiction in CMP NG's representations to us and the clear terms of its agreements with CMP could be attributable simply to an oversight on CMP NG's part. Yet, it seems apparent that, when confronted with this hurdle to imminent construction, CMP NG quickly developed an alternative plan involving Cianbro to circumvent the delays that were inherent in the agreement it had executed. We find this circumstance troubling because it suggests that either CMP NG was caught unaware of this impending dilemma, in which case it was inexcusably blind to its own affairs, or disingenuous in its representations to the Commission. The former conclusion has unpleasant ramifications for CMP NG; the latter seems likely to require us to take punitive action.

We will therefore require CMP NG to explain this circumstance and to show

¹³CMP and CMP NG's request for exemption for prior approval pursuant to §707(3)(F) is scheduled for deliberation on November 15, 1999.

cause why it should not be subject to sanctions for its actions before this Commission.¹⁴

V. Conclusion

We allowed the parties to develop issues of competitive fairness and affiliated dealings in this case because, if competitive unfairness had occurred, it would be a serious problem that we would need to address in an effort to ensure that a level playing field exists to sponsor fair and vital competition among LDC's in Maine. There is reason to continue to pursue these issues. If, in fact, Northern received discriminatory treatment from CMP, a problem may exist.¹⁵ CMP and CMP NG's failure to seek § 707 approval of its Assessment Agreement may have provided it with a competitive advantage over all competitors. We must decide what regulatory actions are warranted to assure a level playing field among natural gas providers competing within the state.

¹⁴The Commission can punish for contempt or for violation of a duty when a utility representative "willfully evades the answer to a question when he knows the answer." See 35-A M.R.S.A. § 1502 and §1503(D). The Commission may also establish a forfeiture of up to \$1,000 per offense as punishment pursuant to § 1508.

¹⁵When a utility is approached by someone with an interest in using one of its corridors, we would expect that a prudent utility would seek out other potential users to make certain that this was the "highest and best" use of the real estate.

We recognize that CMP is not a party to this case and that it has not had an opportunity to describe the actions it has taken. We will take up these issues further in Docket No. 99-739 and hereby consolidate these dockets. Based upon the outcome of our review, we will consider whether it is desirable to open a proceeding to consider the issues surrounding affiliate access to public utility corridors in a broader context.

Alternative Conclusion # 1

Moreover, we will not grant CMP NG authority until we are satisfied that the dealings between these CMP Group affiliates were appropriate and competition was fair. We also must decide whether sanctions are warranted for anti-competitive actions or in response to the grievances raised by Northern as to CMP NG's provision of information in the course of this case.

This case has spawned an unusual number of procedural disputes and fairness issues related to the parties' actions in this case, including failure to seek approval of the Assessment Agreement, the inconsistency between CMP NG's representations of its construction schedule and its contractual commitments, and discovery delays and irregularities.¹⁶ However, the existence of these problems, coupled with our inability to fully consider whether there were inappropriate dealings between CMP and CMP NG regarding the ROW agreements suggest that we review these matters fully before resolving this case.

Accordingly, we will not grant CMP NG authority until we are satisfied that the

¹⁶For instance, in a data response NU-02-04, CMP NG maintained that if ROW costs exceeded estimated costs, CMP NG would bear the burden of the increased costs. This appears inconsistent with Mr. Kelly's subsequent testimony that CMP NG would be able to exit the Calpine contract if the cost of the ROW were, too high. Tr. G-17-19.

dealings between these CMP Group affiliates were appropriate and competition was fair.¹⁷ We also must decide whether sanctions are warranted for anti-competitive actions or in response to the grievances raised by Northern as to CMP NG's provision of information in the course of this case.

OR

Alternative Conclusion # 2

The question whether the public convenience and necessity require a second utility to serve Westbrook and Gorham and our approval of the affiliated interest agreement between CMP and CMP NG are separable. For the reasons discussed above (in the original Examiners' Report) we conclude that need has been shown and that CMP NG should be authorized to serve Gorham and Westbrook. This approval is conditioned on further analysis to consider whether and to what extent CMP NG's actions in the proceeding were so unreasonable as to require denying the certificate as a sanction and whether the affiliate agreements should be approved.

We will consider the affiliated interest agreement in Docket No. 99-739. While it is premature to reach any determination on those issues now, enough questions have been raised that we should note that nothing in our approval here should be construed to suggest that we will, in fact, ultimately approve the affiliated interest agreement. As a practical matter, this could mean that CMP NG will need to reformulate, or perhaps abandon, its plans its plans to serve in the two municipalities. Any investments, which CMP NG might

¹⁷In the interest of allowing project construction to take place as planned in order not to delay the Calpine facility's in-service date, CMP has requested a temporary exemption from the §707 requirement of prior approval for CMP and CMP NG's agreements for use and transfer of property rights in the CMP corridor for this project.

make in anticipation of a positive finding in Docket 99-739, are strictly at CMP NG's own risk.

OR

Alternative Conclusion #3

Accordingly, we will limit our approval to allowing CMP NG to serve only Calpine at this time. There is a separate state interest in insuring that the Calpine plant become operable and provide electricity to the Maine and New England Markets. We will decide whether this authority should be expanded to include Westbrook and Gorham at the same time we decide the affiliated interest case (Docket No. 99-739). Our final disposition of the request to serve the remainder of the Westbrook and Gorham will hinge upon whether significant problems are found in our review of the affiliated agreements in Docket No. 99-739.

Respectfully submitted,

Carol A. MacLennan
Hearing Examiner

With Advisory Staff:
Thomas Austin
Denis Bergeron
Gary Farmer
Lucretia Smith